No. 95-595

(D)

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In The

Supreme Court of the United States

October Term, 1995

HILLER SYSTEMS INCORPORATED, *et al.*,

Petitioners,

vs.

ISABELLA SERVIS, Administratrix of the Estate of Peter Thomas Humphrey,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Statement of the Case	1
A. Factual Background	1
B. Procedural Background	2
Reasons for Denying the Writ	3
I. The Fourth Circuit correctly interpreted the exclusivity provision of the Suits in Admiralty Act.	4
II. The Fourth Circuit's construction of the Suits in Admiralty Act is consistent with congressional intent.	8
III. The Fourth Circuit properly examined cases decided under the Federal Tort Claims Act to determine agency status under the Suits in Admiralty Act.	9
IV. The Fourth Circuit correctly applied the Law of Agency in its opinion.	9
Conclusion	12

TABLE OF CITATIONS

Cases Cited:

Bowman v. Pan American World Services, Inc., 704 F. Supp. 695 (E.D. La. 1989)	5

Contents

	Page
Carter v. American Export Isbrandsten Lines, 411 F.2d 1185 (2d Cir. 1969)	7
Concepcion v. United States Navy, 575 F. Supp. 23 (S.D. N.Y. 1983)	7
Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783 (1949)	8
Doyle v. Bethlehem Steel Corp., 504 F.2d 911 (5th Cir. 1974)	7
Landry v. United States, 815 F. Supp. 1000 (E.D. Tex. 1993)	7
Negonsott v. Samuels, 507 U.S. 99 (1993)	6
Petition of the United States, 367 F.2d 505 (3d Cir. 1966)	6, 7
Rollins v. Board of Governors for Higher Education, 761 F. Supp. 933 (D.R.I. 1991)	7
Saffrhan v. Buck Steber, Inc., 433 F. Supp. 129 (E.D. La. 1977)	5, 9
Servis v. Hiller Systems, Inc., 858 F. Supp. 590 (E.D. Va. 1994)	3, 4
Servis v. Hiller Systems, Inc., 54 F.3d 203 (4th Cir. 1995)	3, 9, 11

Contents

Page

Smith v. United States, 346 F.2d 449 (4th Cir. 1965) 5, 8

Tarver v. United States, 785 F. Supp. 607 (S.D. Miss. 1991) 7

Trautman v. Buck Stever, Inc., 693 F.2d 440 (5th Cir. 1982) 3, 5, 6, 9, 10

Walters v. Tidewater Fleet, Inc., 1994 WL 109763 (E.D. La. March 30, 1994) 5

West v. United States, 361 U.S. 118 (1959) 3, 10

Westerman v. United States, 568 F. Supp. 485 (E.D. N.Y. 1983) 10, 11

Williams v. United States, 50 F.3d 299 (4th Cir. 1995) 3

Statutes Cited:

28 U.S.C. § 1346(b) 3, 9

33 U.S.C. §§ 901 *et seq.* 3

33 U.S.C. § 902(21) 10

33 U.S.C. § 905(b) 10

46 U.S.C. App. §§ 741 *et seq.* 1

46 U.S.C. App. § 745 .....1, 2, 4, 6, 7, 8

Contents

	Page
46 U.S.C. App. §§ 781 *et seq.*	10
46 U.S.C. App. § 782	10
Rules Cited:	
Supreme Court Rule 10.1(a)	3
Supreme Court Rule 10.1(c)	4
Other Authorities Cited:	
Restatement of Agency § 14N, Comment b	10
S. Rep. No. 1782, 81st Cong., 2d Session (1950)	8

STATEMENT OF THE CASE

The Petition for Writ of Certiorari arises out of an action for wrongful death filed by the Respondent, Isabella Servis ("Servis"), administratrix of the estate of Peter Thomas Humphrey ("Humphrey"). Humphrey was killed while he was working aboard the M/V CAPE DIAMOND, when a massive amount of carbon dioxide ("CO_2") was discharged into the engine room where he was working.

The only issue raised by Petitioners is whether they were agents of the United States as contemplated by the "exclusivity clause" of Suits in Admiralty Act, 46 U.S.C. App. §§ 741 *et seq.* ("the SAA"). That clause provides, in pertinent part:

> . . . where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States. . . .

46 U.S.C. App. § 745. If Petitioners were agents of the United States, then Servis' sole remedy for Humphrey's wrongful death is an action against the United States in federal court. If Petitioners were not the agents of the United States, then Servis may proceed against them directly for their negligent acts.

A. Factual Background

Petitioners' characterization of the contractual relationships among the parties is misleading. Marine Transport Lines, Inc. ("MTL") did not delegate any of its operational responsibilities to either Norfolk Shipbuilding & Drydock Corporation ("Norshipco") or Hiller Systems, Inc. ("Hiller").

The CAPE DIAMOND was operated by MTL under a Ship Manager's Agreement ("the Agreement") with the United States Maritime Administration ("MARAD"), an agency of the United States Department of Transportation. The Agreement authorized MTL, and only MTL, to manage and conduct the business of the CAPE DIAMOND. Norshipco was responsible for the performance of certain specific tasks aboard the CAPE DIAMOND under a contract with MTL, and later with MARAD. Hiller received a purchase order from Norshipco for certain of those tasks. Later, Hiller was hired directly by MTL for the limited job of testing and repair of the ship's low pressure CO_2 firefighting system. Hiller scheduled and conducted the test of the CO_2 system on March 3, 1993. No MTL personnel were involved in the testing.

While MTL subcontracted certain work required under the Agreement, only MTL was referred to in the Agreement as MARAD's agent. Neither Norshipco nor Hiller was ever referred to in any of the contracts between the parties as an agent of MARAD. None of the agreements or purchase orders evidenced any intent by the United States to enter into a fiduciary relationship with Norshipco or Hiller. None of the agreements or purchase orders indicates that Norshipco or Hiller consented to act as the government's fiduciary. Neither Hiller nor Norshipco was under the supervision and control of MARAD. MARAD, through its agent MTL, simply approved the subcontracts submitted by the subcontractors.

B. Procedural Background

Servis originally filed suit in the Circuit Court for the City of Norfolk, Virginia. Petitioners removed the case to the federal District Court on the grounds that they were agents of the United States as contemplated by § 745 of the SAA and that Servis' exclusive remedy was against the United States in federal court.

Norshipco then filed a third party complaint against the United States. The District Court ruled that Petitioners were agents of the United States under the SAA and therefore immune from suit. *Servis v. Hiller Systems,Inc.*, 858 F. Supp. 590 (E.D. Va. 1994). The court granted summary judgment in favor of Petitioners and dismissed Norshipco's third party complaint. In a unanimous opinion, the Fourth Circuit reversed. That court held that Petitioners were not agents of the United States, and remanded the case for further proceedings consistent with its opinion. *Servis v. Hiller Systems, Inc.*, 54 F.3d 203 (4th Cir. 1995). Petitioners then filed their Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE WRIT

The Court of Appeals held that, in the absence of operational control by the United States over the physical performance of their contractual duties, Norshipco and Hiller were not agents of the United States within the meaning of the SAA. *Servis v. Hiller Systems, Inc.*, 54 F.3d 203, 208 (4th Cir. 1995). This decision does not conflict with the decisions of any other Court of Appeals or of any state court of last resort. Sup. Ct. R. 10.1(a). In fact, it is in accord with the only other Court of Appeals case in which the issue of contractor liability under the SAA has been addressed. *See Trautman v. Buck Steber, Inc.*, 693 F.2d 440 (5th Cir. 1982).

The Fourth Circuit's decision also comports with the decisions of this Court and of other Courts of Appeals construing comparable statutes, the Federal Tort Claims Act (28 U.S.C. § 1346(b)) and the Longshore and Harbor Workers Compensation Act (33 U.S.C. §§ 901 *et seq.*). *See Williams v. United States*, 50 F.3d 299 (4th Cir. 1995); *West v. United States*, 361 U.S. 118 (1959). This is therefore neither a case in which an important question of federal law has not been settled by this Court nor one in which a federal question has been decided in a

way that conflicts with applicable decisions of this Court. *See* Sup. Ct. R. 10.1(c).

Contrary to Petitioners' assertion, this case does not raise any "question of maritime law and policy . . . of national and international concern." In holding that Petitioners were not agents of the United States, the Fourth Circuit followed basic principles of agency law and the plain language of the SAA, which by its terms defines an agent as one who is "engaged by the United States to manage and conduct the business of" a government vessel. 46 U.S.C. App. § 745. Its decision simply ensures that the United States will continue to be liable only for the acts of its designated agents, authorized by it to exercise operational control over its vessels.

I.

THE FOURTH CIRCUIT CORRECTLY INTERPRETED THE EXCLUSIVITY PROVISION OF THE SUITS IN ADMIRALTY ACT.

The SAA provides:

> . . . where a remedy is provided by [the SAA], it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States . . . whose act or omission gave rise to the claim.

46 U.S.C. § 745.

There are only three cases[1] in which a subcontractor has been

1. Strictly speaking, there is a fourth case, namely, *Servis v. Hiller Systems, Inc.* 858 F. Supp. 590 (E.D. Va. 1994). That decision was, however, reversed by the Fourth Circuit in this case.

held to be the agent of the United States under the SAA, all decided in the United States District Court for the Eastern District of Louisiana. They are *Saffrhan v. Buck Steber, Inc.*, 433 F. Supp. 129 (E.D. La. 1977); *Bowman v. Pan American World Services, Inc.*, 704 F. Supp. 695 (E.D. La. 1989); and *Walters v. Tidewater Fleet, Inc.*, 1994 WL 109763 (E.D. La. March 30, 1994).

In *Bowman* and *Walters*, the subcontractors had contracted to operate the vessels of the United States. They are therefore distinguishable from this case. Operators of vessels owned by the United States have long been held to be its agents. *See, e.g., Smith v. United States*, 346 F.2d 449 (4th Cir. 1965).

In *Saffrhan*, plaintiff was a member of a diving crew employed by the subcontractor as part of a joint effort by the United States and Egypt to remove wrecks from the Suez Canal. At the time of his injury, he was working aboard an Egyptian boat manned by an Egyptian crew, under the supervision of U.S. Navy officers. His injury was the result of an effort, ordered by a U.S. Navy captain, to raise an inoperative anchor. Plaintiff sued his subcontractor employer for his injuries. The district court ruled that the subcontractor was the government's agent and that plaintiff's only remedy was a suit against the United States under the SAA.

In contrast to *Saffrhan*, *see Trautman v. Buck Steber, Inc.*, 693 F.2d 440 (5th Cir. 1982). Plaintiff in *Trautman* was a salvage diver employed by the same subcontractor as plaintiff in *Saffrhan*, and likewise to clear wrecks from the Suez Canal under the agreement between the United States and Egypt. Although he was performing an identical job in virtually identical circumstances for the identical subcontractor as plaintiff in *Saffrhan*, the Fifth Circuit held that the subcontractor was not an agent of the United States.

> The question of whether [the subcontractor] was an agent, an independent contractor and an agent, or an independent contractor who breaks the chain of duty and liability before it reaches the United States, is really a question of the degree of operational control which the United States had over [the subcontractor].

Trautman, 693 F.2d at 445. In *Trautman,* as in this case, the United States had personnel on site to monitor the subcontractor's performance to ensure compliance with contractual requirements, but this "did not amount to the type of control necessary to establish [the subcontractor] as an agent of the United States." *Id.* at 446.

In addition, the language of the SAA itself makes it clear that the statute is not applicable to independent contractors like Petitioners. A basic principle of statutory construction is that words in a statute must be given their plain meaning. *Negonsott v. Samuels,* 507 U.S. 99 (1993). Another basic principle of statutory construction is that two provisos in a statute must be read *in pari materia. Petition of the United States,* 367 F.2d 505, 510 (3d Cir. 1966). The first proviso of § 745 of the SAA refers to the "agent or employee of the United States." The second proviso refers more specifically to "any person, partnership, association, or corporation *engaged by* the United States to *manage and conduct the business of* a vessel owned . . . by the United States." This language is not disjunctive. The statute contemplates as "agents or employees" only those entities employed as general agents or operators of the vessel. Only operators manage and conduct a vessel's business. Neither Norshipco nor Hiller was engaged by the United States to manage and conduct the business of the CAPE DIAMOND. The vessel's manager was MTL under the Ship Manager's Agreement with MARAD.

None of Petitioners was involved in the management of the CAPE DIAMOND. MTL, as the general agent of the United States, could subcontract certain specified tasks, but it was not authorized to, and it did not, delegate any of its management responsibilities. It is true that the Third Circuit in *Petition of the United States* observed that "Congress intended . . . to make governmental liability exclusive throughout a broad spectrum of contractual arrangements for the operation of public vessels." *Id.*, 367 F.2d at 511. But, with the exception of *Saffrhan, supra*, all of the cases construing § 745 have involved entities engaged by the United States to operate its vessels, rather than merely to perform limited tasks aboard those vessels. *See Doyle v. Bethlehem Steel Corp.*, 504 F.2d 911 (5th Cir. 1974) (agent engaged to "manage and conduct the business of" the government with respect to Navy tankers); *Carter v. American Export Isbrandtsen Lines, Inc.*, 411 F.2d 1185 (2d Cir. 1969) (applying § 745 to "general agents" under a "General Agency" agreement); *Landry v. United States*, 815 F. Supp. 1000 (E.D. Tex. 1993) (plaintiff alleged in his pleadings that the contractor was the government's agent); *Tarver v. United States*, 785 F. Supp. 607, 611 (S.D. Miss. 1991) ("[g]enerally speaking, a contract operator of a government vessel is an agent of the United States for purposes of § 745"); *Rollins v. Board of Governors for Higher Education*, 761 F. Supp. 933 (D.R.I. 1991) (parties were required to submit evidence that purported agent was acting as fiduciary for the United States under its general control and direction); *Concepcion v. United States Navy*, 575 F. Supp. 23 (S.D. N.Y. 1983) (§ 745 precludes recovery against "contract operator" of Navy ship). But Petitioners were not engaged to operate the CAPE DIAMOND — that is, they were not engaged to "manage and conduct" its business.

II.

THE FOURTH CIRCUIT'S CONSTRUCTION OF THE SUITS IN ADMIRALTY ACT IS CONSISTENT WITH CONGRESSIONAL INTENT.

When Congress enacted the exclusivity provision of § 745, it expressed its intent clearly:

> The legislation is not intended . . . to affect remedies which may exist against other parties involved by existing law in any appropriate forum. It merely restates expressly the law presently established by the courts . . .

S. Rep. No. 1782, 81st Cong., 2d Session (1950).

As the Fifth Circuit pointed out in *Smith v. United States,* 346 F.2d 449, 454 (4th Cir. 1965), the enactment "was the adoption by Congress of the exclusivity principle enunciated in *Cosmopolitan Shipping Co. v. McAllister,* 337 U.S. 783 [(1949)]." This Court had ruled in *McAllister* that, as the general agent of the United States, the operator of a government vessel could not be sued. However, no cases decided before the 1950 enactment contained any language to suggest that an independent contractor could not be sued for its own negligence. Indeed, the reference in the Senate Report to "remedies against other parties" makes it plain that Congress intended simply to codify those cases in which the United States had been held liable for the acts of its general agents, under the common law rule that a principal is liable for the torts of its agents. "Other parties" can mean only independent contractors who would, at common law, be liable for their own misconduct.

III.

THE FOURTH CIRCUIT PROPERLY EXAMINED CASES DECIDED UNDER THE FEDERAL TORT CLAIMS ACT TO DETERMINE AGENCY STATUS UNDER THE SUITS IN ADMIRALTY ACT.

There are no cases addressing the issue whether an independent contractor, not a vessel operator, is an agent under the SAA, other than *Trautman* and *Saffrhan, supra.* The Fourth Circuit therefore properly looked to cases decided under an analogous statute, the Federal Tort Claims Act, 28 U.S.C. § 1346(b), for the limited purpose of determining what degree of control by the United States over a contractor's performance of its duties will render a contractor the agent of the government.

IV.

THE FOURTH CIRCUIT CORRECTLY APPLIED THE LAW OF AGENCY IN ITS OPINION.

The Fourth Circuit properly applied basic principles of agency law, as set forth in the Restatement of Agency and as that law has been employed by this Court and other federal courts, in holding that the United States is not liable "for the negligence of independent contractors who are engaged to perform limited tasks aboard government vessels and who are not subject to the United States' operational control." *Servis, supra,* 54 F.3d at 209.

Petitioners argue that their performance of "delegated operational duties," subject only to the government's right under the Ship Manager's Agreement to approve their bills and to direct MTL to terminate them, was sufficient to render them agents of the United States for the purposes of the SAA. In fact, Petitioners fall squarely within the accepted definition of non-agent independent contractors:

> [A] person who contracts to accomplish something for another or to deliver something to another, but who is not acting as a fiduciary for the other, is a non-agent contractor (for example, builders and others who have contracted to accomplish physical results not under the supervision of the one who has employed them to produce the results).

Restatement of Agency § 14 N, Comment b (emphasis added). *See also Trautman, supra,* 693 F.2d at 445.

In *West v. United States,* 361 U.S. 118 (1959), a ship repairman sought damages from the United States for injuries sustained while working on the engine of a government vessel. The suit was filed under the Public Vessels Act, 46 U.S.C. App. §§ 781 *et seq.*, which provides that suits against the United States for damages caused by government vessels "shall be subject to and proceed in accordance with the provisions of" the SAA. 46 U.S.C. App. § 782. The repairman was employed by the government's primary contractor. Nevertheless, he was denied recovery. The United States "had no control of the ship; it had been turned over to the repair contractor for extensive overhaul, which was not performed under the direction of" the government. *Id.* at 124.

See also Westerman v. United States, 568 F. Supp. 485 (E.D. N.Y. 1983). In that case, a repairman, who was injured while working for a subcontractor on a ship owned by the United States, filed suit against the government under the LHWCA, which allows suit against a vessel only for the negligence of the vessel. 33 U.S.C. § 905(b). Under the LHWCA, a "vessel" is defined to include, among others, owners, operators and agents. 33 U.S.C. § 902(21). The District Court found that the worker's injury was caused by the subcontractor's negligence in failing to remove

grease from the deck of the vessel. As in this case, the primary contractor was to perform certain repairs specified in its contract with the government, but subcontracted some of the work. The government retained the right to inspect the work to ensure that it conformed to contract specifications, but did not actively supervise its performance. The District Court refused to hold the United States liable for the subcontractor's negligence, finding that its "degree of control [was] insufficient to justify liability." *Id.* at 493.

If the District Court in Westerman, or if the Court of Appeals in this case, had found an agency relationship between the United States and the independent contractors, the result would have been to convert thousands of claims under the LHWCA into tort actions for negligence against the United States. If Petitioners are agents as contemplated by the SAA, then, as the Fourth Circuit noted, the government will be liable "for every act of negligence by a painter or plumber engaged to perform some limited task aboard a United States vessel, regardless of that party's contractual relationship with the government." *Servis v. Hiller Systems, Inc.*, 54 F.3d at 209. This degree of liability was not the "existing law" when the exclusivity provision of the SAA was enacted, and it certainly does not conform to accepted principles of agency law.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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